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No. 05-1342

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LINDA A. WATTERS,
Petitioner,

v.

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE CENTER FOR STATE ENFORCEMENT OF ANTITRUST AND CONSUMER PROTECTION LAWS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether administrative agency determinations of pre-emption are entitled to *Chevron* deference.

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INTEREST OF *AMICUS CURIAE*[1]

The Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. is a nonprofit public interest and research organization. Its mission is to enhance consumer welfare by supporting the fair, effective, and uniform enforcement of antitrust and consumer protection laws at the state level. The Center is concerned that an aggressive program of preemption of state banking laws by the Office of Comptroller of the Currency will result in inadequate protection of consumers against predatory lending practices and other abuses by firms that originate home loans and refinancings. Firms that originate loans through state-chartered corporations, including wholly-owned subsidiaries of national banks, have traditionally been subject to regulation by State Attorneys General and state banking authorities. If state regulation of such entities is preempted, a significant source of experienced personnel and resources will no longer be available to police against abuses of unsophisticated debtors that appear to be occurring with increasing frequency in the home lending market.

SUMMARY OF ARGUMENT

The role of administrative agencies in resolving preemption questions has been a matter of considerable uncertainty both for this Court and the lower federal courts. There is no doubt that Congress can delegate authority to agencies to act with the force of law, and when they exercise this authority, that their regulations can preempt state law in certain circumstances. It does not follow, however, that agencies—at least absent a very clear delegation of authority from Congress—have authority to issue binding declarations

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to the brief's preparation or submission.

that state law has been preempted. Federal agencies should, of course, be respectfully heard on the question of preemption. But the ultimate determination to displace state law through preemption entails a complex judgment about "the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985). Ideally that balance will be struck by Congress, where the interests of both the federal government and the States are represented. Congress, however, cannot anticipate in advance all possible sources of tension between federal and state law. When unforeseen tensions arise, the decision to displace state law is one that should be made primarily by courts applying judicially-developed principles of preemption, not by agencies in the exercise of normal delegated power to administer particular statutory schemes.

Preemption controversies typically entail two questions, which are interwoven but analytically distinct. The first is the question of interpretation: What does the federal statute or regulation at issue mean? The second is the question of displacement: Given what the federal law means, is any resulting tension between federal law and state law sufficiently great to require the displacement of the state law by federal law, rendering the latter the exclusive source of legal authority?

The first question involves an exercise in statutory and regulatory construction, where it makes sense to draw upon the expertise of federal agencies. Agencies charged with the administration of statutes often have a better understanding of the nuances of a regulatory regime than do courts. And insofar as the resolution of ambiguities in statutes and regulations entails making policy judgments, agencies are more accountable policymakers than courts.

The second question—whether displacement of state law is required—entails a judgment about the degree of tension

between federal and state law, and whether this tension requires displacing state law with a regime of exclusive federal regulation. In answering this question, agencies should not be given the strong deference associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The question is constitutional in nature, grounded in the Supremacy Clause; it is governed by judicially-created doctrine as to which agencies can claim no particular insight; it has systemic implications for the balance of authority between the federal government and the States, as to which agencies can claim no disinterested expertise; and it involves policing the boundaries of agency authority, a function that Congress has generally assigned to courts rather than to agencies themselves.

For all these reasons, courts should review agency views about displacement of state law under the standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), not *Chevron*. *Skidmore* directs courts to consider a variety of contextual factors that bear on the persuasiveness of an agency interpretation, leaving the ultimate resolution of the question for the judiciary. This Court's decisions regarding the role of agencies in resolving preemption questions, on the whole, are far more consistent with the standard of review prescribed in *Skidmore* than *Chevron*. The congruence between this Court's judgments and the *Skidmore* standard confirms the wisdom of applying a standard of persuasion, rather than compulsory deference, in this area.

ARGUMENT

Under the National Bank Act, nationally-chartered banks are expressly exempt from visitation by state authorities. *See* 12 U.S.C. § 484(a) (2000). By regulation, the Office of Comptroller of the Currency (OCC or Comptroller) has declared that state-chartered operating subsidiaries of national banks are entitled to same degree of preemption of state visitation afforded to national banks themselves. *See* 12

C.F.R. § 7.4006. In so ruling, the OCC has vastly expanded the scope of preemption of state law and regulation previously recognized to exist with regard to banking institutions. The Court of Appeals upheld this expansive interpretation of the preemptive scope of the National Bank Act by applying the standard of review of agency interpretations of ambiguous statutes set forth in *Chevron U.S.A. Inc. v. National Resources Defence Council, Inc.*, 467 U.S. 837 (1984). Because the court reached its decision to preempt by applying an erroneous standard of review, the decision below should be reversed.

I. AGENCY POWER TO DETERMINE THE MEANING OF A STATUTE DIFFERS FROM ITS POWER TO DETERMINE THE STATUTE'S PREEMPTIVE SCOPE

The President has limited power to make law on his own authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The many administrative bodies that populate the executive branch, which are wholly creatures of statute, have even fewer inherent lawmaking powers. With rare exceptions, administrative agencies can act with the force of law only if this authority has been delegated to them by Congress. *La. Pub. Serv. Comm'n FCC*, 476 U.S. 355, 374 (1986); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

In order for an agency to act with the force of law, two minimal conditions must always be met. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also Gonzales v. Oregon*, 126 S. Ct. 904, 914-15 (2006); *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Serv.*, 125 S.Ct. 2688, 2699 (2005). First, Congress, exercising one of its enumerated powers, must clearly delegate authority to the agency to act with the force of law. Second, the agency must intend to exercise these delegated powers by taking action having the force of law. *See, e.g., Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983)

("A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue.").

When the prescribed conditions for acting with the force of law are met, the resulting agency-generated law has the full force and effect of a federal statute. This means the rule is binding on all who come within its terms, including not just the regulated community but also the agency itself, as well as the Congress, the President, and the courts. *See, e.g., Nixon v. United States*, 418 U.S. 683, 696 (1974) ("So long as this [legislative] regulation remains in force the Executive Branch is bound by it, and indeed the United States as sovereign composed of the three branches is bound to respect and enforce it."). It also means that agency rules with the force of law partake of the status of "Laws of the United States," and hence are "the supreme Law of the Land." *See* U.S. Const. Art. VI, § 2; *City of New York v. FCC*, 486 U.S. 57, 63 (1988) ("The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.").

Accordingly, it has long been recognized that agency rules having the force of law can preempt state law. The modern era of administrative preemption appears to date from *United States v. Shimer*, 367 U.S. 374 (1960). Following *Shimer*, this Court has held on many occasions that agency regulations having the force of law can supply the basis for a determination that state law is preempted. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that a regulation mandating phase-in of passive restraints in automobiles impliedly preempts state tort law claim predicated on the proposition that installation of air bags was mandatory); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (holding that a federal regulation governing maximum train speed preempts a negligence claim that a speed under the federal maximum was excessive).

Whether agencies have authority to issue binding *declarations* of preemption entitled to *Chevron* deference, however, is quite another matter. Preemption is often characterized as an exercise in statutory interpretation, or as resting entirely on congressional intent. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). But a finding of preemption actually requires answering two interrelated questions. First, there is the question of interpretation: What does the federal statute or regulation at issue mean? Second, there is the question of displacement: Is federal law, as interpreted, in tension with state law, and is this tension sufficiently severe to require the displacement of state law in whole or in part in order to achieve the purposes of federal law? Resolution of the first question does not always—or even usually—answer the second.

Sometimes, of course, Congress expressly determines by legislation that certain state laws are preempted. *See, e.g., Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (construing scope of ERISA's express preemption clause). But "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000). Accordingly, this Court has held state law preempted without regard to whether an express preemption clause is satisfied, *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2000), and has held state law preempted without regard to whether the statute contains an express saving clause, *Geier v. Am. Honda Motor Co.*, *supra*, 529 U.S. at 869.

Both agencies and courts are competent to interpret federal statutes. Agencies engage in statutory and regulatory interpretation all the time, in the ordinary course of discharging their delegated functions. Indeed, this Court has repeatedly

recognized that agencies are preferred interpreters of statutes in certain circumstances.

The question of displacement, however, presents additional factors not present in resolving relatively straightforward questions of interpretation. Ideally, the question of displacement should be resolved by Congress. Congress is the primary lawmaking institution under the Constitution, and it was undoubtedly congressional legislation that the Framers had in mind when they provided in Article VI, § 2 that the "Laws of the United States" would be the "supreme Law of the Land." Congress has the best claim to represent the interests of both the federal government and the States. And Congress has broad powers of investigation, which allows it to gather the relevant facts necessary to determine whether the tension between federal law and state law requires that the latter give way to the exclusion of the former.

But Congress is severely hampered in resolving preemption controversies by the fact that legislation ordinarily operates prospectively. The limits of human knowledge make it virtually impossible for Congress to anticipate all relevant issues before they arise. Congress would have to analyze the common law and statutory rules of fifty different States, including not just those in existence at the time the federal legislation was enacted, but those that might be passed in the future. *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343, 376-77. This is clearly beyond the capacity of even the most far-sighted legislative body.

Given the limits of human knowledge, Congress cannot be expected to resolve all preemption questions through express preemption and savings clauses. Consequently, it is necessary to identify an institution that can resolve these questions only after many of the sources of tension between federal and state law are fully identified. The two obvious candidates for

undertaking such ex post inquiries are courts and the agencies charged with administration of federal statutes.

II. WHY COURTS, NOT AGENCIES, SHOULD DETERMINE WHETHER TO DISPLACE STATE LAW

Agencies might be thought to have an advantage in determining whether to displace state law insofar as this entails a judgment about the requirements of individual federal regulatory schemes, with which agencies have intimate familiarity. *See Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 455 (2005) (Breyer, J., concurring). But the decision to displace state law also implicates the consideration of a wide range of systemic variables as to which the judiciary has a superior claim, not only to competence, but also to authority under our constitutional order. The decision to displace state law presents a variety of concerns that point toward the need for a general jurisprudence of preemption which can be developed and applied in a uniform fashion. Only the courts, and in particular this Court—which has the ability to review questions of preemption that arise both from federal and state courts—can perform the function of determining preemption questions in a manner that maintains a unified jurisprudence of preemption sensitive to the many systemic values at stake.

A. Displacement Presents a Question of Constitutional Law

Deciding whether the effectuation of federal law requires displacement of state law is, as previously noted, partly a matter of interpretation of federal statutory and regulatory law. But it is also a constitutional decision, having "its roots in the Supremacy Clause." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). Indeed, from the perspective of the States, there is little difference between a judgment that state law is unconstitutional, and a judgment that state law is pre-empted. Both types of judgments nullify

otherwise duly enacted state statutes and common law rules of decision. In so doing, both type judgments subtract from the power the States otherwise enjoy as sovereign entities. Both types of claims can give rise to federal jurisdiction under 28 U.S.C. § 1331, and in some circumstances can be redressed under the federal cause of action created in 42 U.S.C. § 1983. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989).

Part of our received tradition is the understanding that the judiciary has unique competence to resolve questions of constitutional law. *Marbury v. Madison,* 5 U.S. (1 Cranch.) 137 (1803). Thus, when agency decisions raise questions of constitutional law, courts uniformly decline to defer to agency interpretations of constitutional meaning. *See, e.g., Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1998) ("the federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution."). Indeed, this Court has refused to defer to agency views when they raise constitutional questions that otherwise can be avoided. *See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2000); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Because the power to displace state law through preemption likewise rests on a provision of the Constitution—the Supremacy Clause—and because from the States' perspective a judgment of preemption is tantamount to a finding of unconstitutionality, it is equally anomalous to say that federal courts must defer to reasonable agency determinations of preemption.

B. Displacement Entails the Application of Law Developed by Courts

Given its origins in the Supremacy Clause, it is not surprising that the legal doctrine governing the decision to displace state law through preemption has been developed exclusively by courts and in particular by this Court. Thus,

the Court has distinguished between express and implied preemption. *See Cipollone*, 505 U.S. at 517. It has developed multiple categories of implied preemption, including conflict, impossibility, frustration of purpose, and occupation of a field. *See, e.g., Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996). And it has identified and enforced a presumption against preemption, when federal regulation involves matters that have been traditionally subject to state police powers. *See Medtronic*, 517 U.S. at 495; *Hillsborough Cty.*, 471 U.S. at 715, 718. This doctrine is transsubstantive, in the sense that it applies across all fields of regulation.

Administrative agencies have played no role in the development of preemption doctrine. The OCC, in its preemption decisions has recognized this fact. In the Federal Register notice accompanying the promulgation of 12 C.F.R. § 7.40006, the OCC noted that the rule "reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable judicial precedent." *Investment Securities; Bank Activities; Leasing*, 66 Fed. Reg. 34,784, 34,790 (July 2, 2001).

Similarly, in determining a preemption question closely related to the one presented here—whether state predatory lending statutes are preempted—the OCC has relied primarily on its understanding that the presumption against preemption does not apply in determining the scope of the powers of nationally chartered banks, a proposition it has attributed to this Court's decision in *Barnett Bank, supra. See Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004). Whether this reading of *Barnett Bank* is correct is doubtful. *See* Nicholas Bagley, Note, *The Unwarranted Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274 (2004). Correct or not, however, the point is that the OCC has justified important preemption decisions largely in terms of its reading of judicial opinions, a source of authority that the OCC has no

special insights in interpreting, and which the judiciary is presumably in a better position to explicate.

C. Displacement Implicates Considerations of Federalism

The decision to displace state law also implicates sensitive questions of federalism. Thus, for example, this Court has described preemption of state common law remedies as a "serious intrusion into state sovereignty." *Medtronic*, 518 U.S. at 488. The decision to displace state law should be informed by an understanding of which areas of regulation have been delegated to the federal government, which have been traditionally been committed to the States, and when constitutional sensitivities would be irritated either by a determination of concurrent authority or of exclusive federal competence.

Agencies are specialized institutions, intensely focused on the details of the particular statutory regimes they are charged with administering. By design and tradition, they are not expected to ponder larger structural issues such as the relative balance of authority between the federal and state governments, the importance of preserving state autonomy, the value of allowing policy to vary in accordance with local conditions, or the systemic advantages of permitting state experimentation with divergent approaches to social problems. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (summarizing the systemic benefits of federalism).

Presidents in recent years have sought to re-direct the tendencies of agencies to overlook federalism values. *See* Executive Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); Executive Order No. 12,988, 61 Fed. Reg. 4,731 (Feb. 7, 1996). Yet even in the face of these executive orders, agencies rarely consider the federalism implications of their actions. One commentator reports:

> The rate of federalism impact statements . . . appears quite low. In 1999, the General Accounting Office

> reported that only five federalism impact assessments had been prepared for the over 11,000 final rules agencies issued between April 1996 and December 1998. A sampling of 600 proposed and final rules during one quarter in 2003 revealed six federalism impact statements prepared by agencies.

Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 783 (2004).

The same author reports that, of the few cases in which federalism impact statements were prepared, "the quality of the analysis . . . suggests that agencies are not especially sensitive to federalism-type values." *Id.* at 784. Specifically, of the five impact analyses reviewed in 2003 that concerned preemption, each justified the preemption of state law "primarily or solely in terms of the agency's statutory authority to do so." *Id.* That is, each analysis ended abruptly following the agency's claim of statutory authority to preempt state law, without any analysis of competing interests such as the preservation of state sovereignty.

The point, of course, is not that agencies have nothing of value to contribute to determinations about when and to what extent to displace state law. Clearly they do. Rather, the point is that agencies have no background or incentives to consider in a systematic fashion the impact of preemption decisions on larger structural issues about the balance of power between the federal government and the States. In the absence of an express directive from Congress, judges, who are generalists and who have a more diverse background in state and local government, are better situated to make these judgments.

D. Displacement Implicates the Scope of Agency Power

Determining whether federal law ousts state law also implicates the scope of agency authority. In *Louisiana Pub. Serv. Comm'n*, *supra*, this Court was confronted with a chal-

lenge to legislative regulations issued by the Federal Communications Commission that mandated a uniform system of depreciation accounting by both state and federal regulators. The FCC stated unequivocally its intent to preempt contrary state depreciation rules. 476 U.S. at 362-63. This Court, however, held that the FCC rules did not preempt state law because this would violate a statutory provision denying the agency any authority to set rates and charges for intrastate telecommunications service. As the Court observed: "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency the power to override Congress. This we are both unwilling and unable to do." *Id.* at 374-75.

There are a variety of reasons why agencies are not the best monitors of the scope of their own authority. Agencies may at times engage in empire-building, or may resent the implicit competition from other sources of regulatory authority like States. Analysts have long observed that agencies, particularly ones devoted to regulation of a single industry, can become too closely identified with the interests of the industry they are supposed to regulate. *See generally* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L Rev. 1 (1998) (providing an overview of empirical studies). At least one court has perceived that this phenomenon may apply to the OCC:

> [T]he constituency positively affected by the OCC's position is concentrated, organized and well-funded, and also happens to be the regulated industry. In contrast, the constituency which is adversely affected by the decision, though vast, is diffuse, unorganized, and definitionally ill-funded.

Wells Fargo Bank of Texas NA v. James, 321 F.3d 488, 494 (5th Cir. 2003). Whether or not this particular characterization is accurate, it underscores the potential pitfalls in

supposing that agencies can be the judge of the scope of their own authority.

Congress has provided for judicial review of agency action in significant part to assure that agencies stay within the bounds of their delegated authority. This Court has been reluctant to carve out any general exception from *Chevron* for agency interpretations that transgress the bounds of agency authority, presumably because of the difficulty of distinguishing between "jurisdictional" and "non-jurisdictional" decisions. *Compare Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment) *with id.* at 386-87 (Brennan, J., dissenting). Exactly how *Chevron* should be reconciled with the traditional judicial role in policing the boundaries of agency authority remains to be fully worked out. Part of the solution may lie in more closely scrutinizing congressional intent at step one of *Chevron* when agencies move to fill "extraordinary" gaps in their statutory authority. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Part of the solution may also lie in more closely examining the scope of an agency's delegated authority in determining at "step zero" whether the preconditions for *Chevron* deference are met. *See Gonzales v. Oregon*, 126 S.Ct. 904, 916-22 (2006); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 209-10 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L. J. 833, 873-89, 910-14 (2001).

There is no need in this case, however, to tackle this more general problem. Questions about whether state law should be preempted by federal law are not handicapped by any definitional conundrum similar to the one presented by determining when an agency has acted outside its "jurisdiction." The question whether federal law requires the displacement of state law is discrete and readily differentiated from other issues of interpretation. *See* Mendelson, *supra*, at

796 ("Preemption questions are relatively easy to distinguish, ex ante, from other categories of interpretative questions, so withdrawing deference on preemption issues would not introduce significant new uncertainty-based costs . . . ."). Consequently, the decision to preempt can be subject to a more demanding standard of review, allowing courts to police the boundaries of agency authority—along this dimension at least—without calling into question the general principle of deference established by *Chevron*.

III. AGENCY VIEWS ABOUT PREEMPTION SHOULD RECEIVE *SKIDMORE* DEFERENCE, NOT *CHEVRON* DEFERENCE

The forgoing considerations suggest that the proper standard for reviewing agency determinations of preemption is not the one set forth in *Chevron*, but rather the older yet enduring standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

A. *Chevron* and *Skidmore*

This Court has identified two standards of review for evaluating agency interpretations of statutes: the *Chevron* standard and the *Skidmore* standard. *See generally Mead*, 533 U.S. at 227-28, 234-35. The two standards rest on different rationales for affording deference to agency interpretations of ambiguous statutes. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see Chevron*, 467 U.S. at 843-44 (deference rests on either express or implied delegation of power to agency). This delegation, in turn, creates a presumption that Congress intended the agency, rather than the courts, to exercise primary interpretational authority under the statute. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (*Chevron* rests on the "presumption" that

Congress meant for the agency to "possess whatever degree of discretion" statutory ambiguity allows).

Under *Skidmore*, in contrast, no particular delegation of power to the agency is required before it is entitled to deference. 323 U.S. at 137. Deference under *Skidmore* is grounded not on delegated power but rather on the desirability of drawing upon the "specialized experience and broader investigations and information" available to the agency, *id.* at 139, and on the need to preserve uniformity between administrative and judicial understandings of the requirements of a national program. *Id.* at 140.

Given this critical difference in the legal underpinnings of *Chevron* and *Skidmore*, the standards with which they are associated impose different degrees of constraint on the courts. *Chevron* deference, when it applies, is mandatory, in the sense that a court must accept any agency interpretation that is consistent with the statute and is otherwise "permissible" or "reasonable." 467 U.S. at 844 (reasonable agency interpretation is given "controlling weight"). *Skidmore* deference, in contrast, rests in the sound discretion of the court. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. As the Court put it in *Mead*, an agency opinion evaluated under *Skidmore* receives the degree of deference appropriate to "the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." 533 U.S. at 235.

B. *Skidmore* Supplies the Standard for Reviewing Preemption Determinations

Skidmore strikes the right balance between the competing considerations presented by preemption controversies, entail-

ing, as they do, the need both to determine the meaning of federal law and to decide whether federal law requires displacement of state law. *Skidmore* instructs courts to give careful consideration to agency views, grounded in experience, about the impact of divergent state laws on the implementation of federal programs. Yet it requires courts to follow these views only to the extent they are persuasive, thereby preserving judicial authority to maintain a uniform jurisprudence of preemption that is sensitive to the systemic variables discussed in Part II that make courts the preferred institution for making the final determination whether to displace state law.

Moreover, the logic of *Chevron* itself requires in most cases that courts apply the *Skidmore* standard rather than *Chevron* to issues about preemption of state law. *Chevron* is grounded in a delegation of authority from Congress to an agency to determine certain unresolved questions of federal law. If Congress has not delegated authority to an agency to make binding determinations of preemption, or if an agency has been given such authority but does not invoke that authority in offering its view about the preemptive effect of federal law, then the preconditions for *Chevron* deference have not been established. The Court recently recognized this point in the specific context of preemption in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006). The Court observed there that a delegation of authority to an agency to promulgate standards for regulated entities to follow does not entail "the authority to decide the preemptive scope of the federal statute" unless a *separate delegation* of such authority is evident in the statute. *Id.* at 919, citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

Here, there is no indication that Congress has delegated authority to the OCC to make binding determinations of preemption. The Court of Appeals cited 12 U.S.C. § 93a (2000), *see* Pet. App. 5a, which gives the Comptroller

authority "to prescribe rules and regulations to carry out the responsibilities of the office." This provision does not unambiguously confer authority on the OCC to issue legislative regulations, the only type that can be said to have preemptive effect. *Cf. Chrysler Corp.*, 441 U.S. at 310 (holding that 5 U.S.C. § 301, which confers authority on the head of an executive department to prescribe regulations for the "government of his department," does not confer authority to make legislative rules). Even assuming § 93a authorizes legislative rules, however, it does not authorize legislative rules that *preempt state law*. The power to displace state law or to declare state law preempted is not mentioned, either explicitly or by clear implication. If § 93a suffices to delegate authority to agencies to make binding determinations of preemption, then every federal administrative agency with a general grant of authority to make rules and regulations would be empowered to make binding determinations of preemption.

Nor does 12 U.S.C. § 43 (2000), requiring that federal banking agencies follow specific procedures "[b]efore issuing any opinion letter or interpretative rule" dealing with preemption, constitute a grant of such authority. Section 43 nowhere confers any authority on any agency to make preemption decisions. Rather, it imposes a *limitation* on any pre-existing agency authority with regard to preemption, requiring procedures beyond those set forth in the Administrative Procedure Act for issuing opinion letters or interpretative rules. *See* 5 U.S.C. § 553(b) (2000) (exempting interpretative rules and general statements of policy from notice and comment requirements). This is confirmed by the Conference Report, which states that the new procedures are "not intended to confer upon the agency any new authority to preempt or to determine preemptive Congressional intent . . . or to change the substantive theories of pre-emption, as set forth in existing law." H.R. Rep. No. 103-651, at 55, *as reprinted in* 1994 U.S.C.C.A.N. 2068, 2076.

If anything, § 43 appears to confirm congressional understanding that any agency view about preemption will be advisory only. "Opinion letters" and "interpretative rules" are nonbinding forms of agency action, offering only advice to the regulated community about an agency's understanding of the law's requirements. *See, e.g.*, 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4 (4th ed. 2002). They do not have the force of law, and hence are not eligible for *Chevron* deference. *See Mead*, 533 U.S. at 234; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Congress occasionally delegates authority to agencies to make determinations of preemption that have the force of law. But when it does so, it conveys such authority in unmistakable language.[2] Section 43 falls well short of such an unambiguous grant.

C. All Predicate Legal Determinations Must be Assessed Under *Skidmore*

A final and critical point is relevant here. When an agency seeks judicial deference for its judgment that preemption is required, courts must review not just the agency's final conclusion that preemption is required, but *all* agency interpretations of federal law that serve as a predicate to that determination, under the *Skidmore* standard. As previously noted, preemption decisions entail two interrelated inquiries: determining the meaning of federal law and whether any tension between federal and state law requires displacement of state law. If the agency seeks deference for its interpreta-

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[2] *See* 30 U.S.C. § 1254(g) (2000) (authorizing Secretary of Interior to identify state laws and regulations preempted by the Surface Mining Control and Reclamation Act); 47 U.S.C § 253(d) (authorizing FCC to "preempt the enforcement of" state and local statutes, regulations, or legal requirements interfering with development of competitive telecommunications services); 49 U.S.C. § 5125(d) (authorizing Secretary of Transportation to determine whether particular state, local or tribal requirements respecting the transportation of hazardous materials are preempted).

tion of federal law and no issue about displacement of state law is presented, then there is no reason why *Chevron* should not supply the relevant standard (provided the other preconditions for *Chevron* deference are met). *See Smiley v. Citibank (South Dakota), supra.* But if the agency asks the court to defer to its judgment that displacement is required, all steps in the chain of logic that lead to this conclusion should be reviewed under *Skidmore*. Any other approach would lead to easy evasion of the limits on agency authority to preempt.

In this case, for example, the OCC has asserted three different pathways to preemption. One pathway relies on 12 C.F.R. § 7.4006, which provides that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Here the OCC's regulation makes express reference to the application of state law, and thus the regulation can be readily identified as embodying the conclusion that preemption is required.

But the OCC has also argued that preemption follows from 12 C.F.R. § 5.34(e)(3), which provides that an operating subsidiary engages in activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activity by its parent national bank." Here, there is no explicit reference to the application of state law, so on its face the regulation does not appear to pre-empt state law. In litigation, however, the OCC has claimed that the effect of this regulation is exactly the same as § 7.4006: By equating operating subsidiaries with the parent national bank, the regulation compels the conclusion that operating subsidiaries, like the parent bank, are exempt from state visitation requirements.

Similarly, the OCC has argued that preemption follows from 12 C.F.R. § 34.4(a)(1), which provides that "a national bank may make real estate loans . . . without regard to state law" requirements for "licensing" and "registration," in com-

bination with 12 C.F.R. § 34.1(b), which provides that "[t]his part applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34." Again, by equating operating subsidiaries with national banks, the rule in effect mandates that operating subsidiaries enjoy the same preemption status as national banks.

Whichever pathway is chosen, the OCC is claiming authority to preempt regulation of state-chartered operating subsidiaries on the same basis as Congress has preempted regulation of nationally-chartered banks. This conclusion, however reached, implicates fundamental questions about the allocation of regulatory authority between the federal government and the States, and hence should be reviewed under the *Skidmore* standard, not *Chevron*.

IV. THIS COURT'S POST-*CHEVRON* DECISIONS ADDRESSING AGENCY VIEWS ABOUT PREEMPTION SUPPORT THE *SKIDMORE* STANDARD

One can mine this Court's post-*Chevron* decisions for a variety of propositions about the role of administrative agencies in determining questions of preemption. There are statements which appear to pre-suppose that courts should give strong deference to agencies' views about preemption, *see City of New York v. FCC*, 486 U.S. at 64; statements that appear to contemplate an intermediate degree of deference to agency views, *see Geier*, 529 U.S. at 883; and state-ments that suggest the question of preemption should be decided *de novo*, without giving any weight to agency views, *see Louisiana Pub. Serv. Comm'n*, *supra*. Considered as a whole, however, the multiple pronouncements on this subject by the Court and individual Justices are most consistent with the *Skidmore* standard of review.

Of particular relevance in the present case, the Court has never suggested that *Chevron* deference is appropriate in

determining the preemptive scope of the National Bank Act. The Court has on occasion granted *Chevron* deference to decisions of the OCC interpreting the National Bank Act. But in none of these cases did the Court give *Chevron* deference on a question of preemption. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), is particularly instructive in this regard. The question was whether a national bank could charge a credit-card holder a late-payment fee that was lawful in the bank's home State but prohibited in the cardholder's State. The bank contended that state restrictions on late-payment fees were preempted by § 85, which authorizes a national bank to charge "interest at the rate allowed by the laws of the State . . . where the bank is lo cated." 12 U.S.C. § 85. In a unanimous decision, this Court applied *Chevron* and upheld the Comptroller's regulation determining that "interest" within the meaning of § 85 includes late payments fees. In so ruling, however, the Court made very clear that it was *not* resolving, and certainly was not giving *Chevron* deference to, any question of preemption:

> [Petitioner] argues that the "presumption against . . . pre-emption". . .in effect trumps *Chevron*, and requires a court to make its own interpretation of § 85 that will avoid (to the extent possible) pre-emption of state law. This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is not the question at issue here; there is no doubt that § 85 pre-empts state law.

517 U.S. at 743-44 (second ellipsis added). *Smiley* thus unequivocally reserved, without deciding, the question presented in this case.

Similarly, in *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995), the Court gave *Chevron* deference to an interpretation of the

National Bank Act adopted by the Comptroller. But the issue in question—whether annuities are "insurance" within the meaning of § 92 of the Act—did not present any question of preemption. Likewise, in *Clark v. Securities Industry Assn.*, 479 U.S. 388 (1987), the Court deferred to the OCC's determination that national banks can establish affiliates to offer discount brokerage services without offending the branch banking limitations of the Act, citing *Chevron* among other decisions. *Id.* at 404. Again, no issue of preemption was presented.[3]

Several post-*Chevron* decisions outside the banking context have given more extensive consideration to the relevance of agency views about preemption. The Court's discussion of the question in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2001), is entirely consistent with *Skidmore*. The Court there concluded that it would give "some weight" to the agency's interpretation of its regulation as impliedly preempting state tort liability. *Id.* at 883. The Court noted:

> Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time.

Id. (citations omitted). In light of the cited factors, which are virtually a paraphrase of *Skidmore*, the Court concluded that "the agency's own views should make a difference." *Id.* The dissenting opinion in *Geier* stated that the agency's view "'do[es] not warrant *Chevron*-style deference.'" *See id.* at

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[3] A recent preemption decision arising under the banking acts, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), involved no issue of deference to agency interpretation.

911-12 (Stevens, J., dissenting). It added that even "the lesser deference paid to it by the Court today" was "inappropriate," unless the States had been given an opportunity to participate. *Id.* Thus, the dissent recognized that the majority had applied a standard of review less deferential than *Chevron*.

A similar conclusion follows from the discussion of agency views about preemption in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The Medical Device Amendments include a provision expressly preempting any "requirement" different from federal ones applicable to medical devices, and the question was whether this preempted certain state tort claims. The Court independently interpreted the ambiguities in the statute, in particular, uncertainty about the meaning of "requirement." 518 U.S. at 486-91 (plurality opinion). Only after this extensive consideration of the interpretative issues did the Court turn to the FDA's views. The Court cited a number of factors that caused it to give those views "substantial weight," including FDA's general familiarity with the requirements of the Act, the process the FDA had instituted for offering "advisory opinions" to interested parties about whether particular state requirements are preempted, and Congress's specific delegation to the agency of authority to exempt state requirements from preemption. *Id.* at 496. Although the Court cited *Chevron* for the proposition that delegation of authority from Congress to an agency is a reason for deferring to agency interpretations, *id.*, there is no suggestion in the opinion that the Court was applying *Chevron*'s two step framework, or that it regarded the agency's views as controlling as long as they were reasonable. Instead, the Court said only that its independent conclusion was "substantially informed" by the FDA's view about preemption. *Id.* at 495.

This reading of *Medtronic* is confirmed by an exchange between the majority opinion and the opinion of Justice O'Connor dissenting in part. Justice O'Connor wrote that the majority had offered no "sound basis" for deferring to FDA's

view about preemption. *Id.* at 509. Later in her opinion, she observed: "Apparently recognizing that *Chevron* deference is unwarranted here, the Court does not admit to deferring to these regulations, but merely permits them to 'infor[m]' the Court's interpretation." *Id* at 512. She added: "It is not certain that an agency regulation determining the preemptive effect of *any* federal statutes is entitled to deference. . . ." *Id.* Tellingly, the majority responded only to the first remark, noting that the contextual factors it enumerated did provide a "sound basis" for giving weight to FDA's views. *Id.* at 496. But the majority did not deny Justice O'Connor's conclusion that "*Chevron* deference is unwarranted here," nor did it challenge her expression of doubt as to whether deference to agency views is ever appropriate on the question of preemption.

Likewise, in *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 262 (1985), the Court said it would give "substantial deference" to an Interior Department interpretation of a federal statute governing the distribution of federal funds to counties entitled to receive in-lieu payments because they contained large tracts of federal land. But the Court decided *de novo* the question whether this statute displaced state law requiring that payments be allocating the same way general state tax revenues are allocated. The decision thus provides no support for granting *Chevron* deference to agency determinations of preemption.

V. THE *DE LA CUESTA* FORMULATION FOR ASSESSING AGENCY PREEMPTION SHOULD BE CLARIFIED

In several decisions of the 1980's, beginning with *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), the Court offered a formulation of the issues involved in determining the preemptive effect of an agency regulation. This particular formulation is potentially misleading since it omits any mention of traditional preemption doctrine. But neither *de la Cuesta*, nor its formulation of the issues, suggest

that agencies should be given *Chevron* deference on issues of preemption.

The question in *de la Cuesta* was whether a regulation of the Federal Home Loan Bank Board permitting due-on-sale clauses in mortgages initiated by federally-chartered savings and loan associations had the effect of preempting a California rule prohibiting due-on-sale clauses. The case presented a relatively straightforward question of conflict preemption. The Court decided all the critical issues itself, without deferring to any judgment by the Board about whether its regulation did or did not preempt California law.

At one point in his opinion for the Court, however, Justice Blackmun framed the issues to be decided in the following way:

> A preemptive regulation's force does not depend on express congressional authorization to displace state law. . . . Thus, the Court of Appeal's narrow focus on Congress's intent to supersede state law was misdirected. Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.

Id. at 154. This framing of the issues was subsequently repeated in a few later decisions. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984).

The Court in *de la Cuesta* was surely correct that congressional intent to preempt is not necessary when an agency's legislative regulation conflicts with state law. Under the Supremacy Clause, an agency regulation having the force of law is entitled to the same degree of protection against contrary state law as a federal statute. And the two conditions that must be satisfied in any case for a regulation to have the force of law are (1) a delegation of authority from Congress

to act with the force of law, and (2) the agency's intention to exercise such authority. *Mead*, *supra*. In other words, to use *de la Cuesta's* terms, agency intent to preempt and agency action within the scope of its delegated authority.

Unfortunately, this framing of the issues in *de la Cuesta* has been taken by some courts to mean that the *only* questions to be resolved in determining the preemptive effect of an agency regulation are whether the agency intended to preempt state law and whether it was acting within the scope of its authority. If this were all that is required, then any agency, as long as it was acting within the scope of its general regulatory authority, could preempt state law on its mere say-so. Agencies with general grants of rulemaking authority could become runaway engines of preemption. Such a state of affairs would be deeply troubling for all the reasons canvassed in the Part II, and would be thoroughly incompatible with our legal traditions.

What is missing from the quoted passage is a third requirement, which is simply a restatement of traditional preemption doctrine. *In addition to* asking whether the agency intended to preempt and whether the agency acted within the scope of its authority, the court must always ask whether displacement of state law is required under traditional preemption doctrine. Specifically, the court must inquire whether Congress has expressly provided for preemption, or whether preemption should be implied because of a conflict between state and federal law or because federal law has occupied the field. There is no reason to believe that the Court in *de la Cuesta* was disavowing traditional preemption doctrine. Elsewhere in the opinion the Court provided an apt summary of that doctrine, *see* 458 U.S. at 152-53, and there is little doubt that conflict preemption was properly found to exist on the facts presented.

Nevertheless, in the hands of some lower courts—including the Court of Appeals in the case under review—the

passage from *de la Cuesta* has been taken as stating a self-contained framework for assessing agency preemption, without regard to the elements of traditional preemption doctrine. *See* Pet. App. 6a-7a. When this truncated framework is coupled with *Chevron* deference—as again happened in the decision under review and in the similar cases decided by the Second and Ninth Circuits—the possibilities for agency preemption of state law become virtually limitless.

Clearly there is no need to overrule *de la Cuesta*. The case was correctly decided under established principles of conflict preemption. Likewise, *Crisp* was a straightforward conflict preemption case, and *City of New York* rested in significant part on congressional ratification of previous agency preemption decisions. Moreover, none of these decisions speaks to the question whether courts should give *Chevron* deference to agency preemption decisions. In each case the Court reviewed *de novo* both the question whether the agency intended its regulation to have preemptive effect, and whether it was acting within the scope of its authority. Indeed, none of the cases cites to *Chevron* (two pre-date *Chevron* and the third was decided a short time thereafter). In the interests of eliminating a potential source of confusion, however, it would be useful for the Court to take this occasion to clarify that *de la Cuesta* was not intended to modify the traditional elements of preemption doctrine in the context of agency determinations of preemption.

VI. THE SIXTH CIRCUIT APPLIED AN ERRONEOUS STANDARD OF REVIEW

The Sixth Circuit in the decision under review applied the *Chevron* standard of review in determining that Michigan banking laws are preempted insofar as they apply to state-chartered operating subsidiaries of nationally chartered banks. The Solicitor General has argued that a similar decision of the Second Circuit deferred to the OCC only on the question of the meaning of federal law, not on whether federal law

requires displacement of state law. *See* Brief for the United States as Amicus Curiae, *Burke v. Wachovia Bank, N.A.*, No. 05-431 (May 2006). Thus, the Solicitor General claims, it is the National Bank Act, not the agency, which is responsible for preemption of state visitation authority. This contention cannot be sustained.

The Court of Appeals expressly stated that it would resolve the *preemption question* "through the framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." Pet. App. 7a. The court concluded that the National Bank Act was ambiguous on the question whether operating subsidiaries should be treated the same as a national bank itself for purposes of determining the scope and application of state law. *Id.* at 9a. It found that the OCC had answered that question 12 C.F.R. § 7.4006. *See Id.* at 6a. The court then asked, per *Chevron*, whether this was a "reasonable construction of the statutory scheme." *Id.* at 10a. It concluded: "The regulations, specifically section 7.4006, simply reflect the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law, it ought not be hindered by conflicting state regulations. . . . *Chevron requires us to defer to this reasonable interpretation.*" *Id.* at 11a (emphasis added).

This was error. For all the reasons previously discussed, the question whether to displace state law cannot be resolved by asking whether an agency's determination to find preemption is reasonable. If Congress has not expressly resolved the preemption question, then it should be resolved by the judiciary, applying judicially-developed standards for determining the scope of express preemption clauses and identifying the circumstances when implied preemption is required. The views of administrative agencies are entitled to respectful consideration in this process, under the *Skidmore* standard. But they should not be considering controlling merely because they can be characterized as reasonable.

Under the *Skidmore* standard, the focus of inquiry is not on the authority of the agency, but rather on the reasons it gives in support of its conclusion that preemption is warranted. The Court of Appeals did not consider the reasons given by the OCC in support of its determination that state bank visitation rules are preempted. Specifically, the court did not evaluate how long the agency has maintained that position, and whether the position has been consistently maintained. Nor did it consider whether the reasons cited by the OCC draw upon particular expertise of the agency in matters of involving the regulation of financial institutions, and its understanding of the differences between federal and state visitation requirements. If the Court evaluates the relevant OCC rules and decisions against the *Skidmore* standard, we believe it will find that the reasons given by the agency, such as they are, are unpersuasive. *See Investment Securities; Bank Activities; Leasing*, 66 Fed. Reg. 34784 (July 2, 2001); *Bank Activities and Operations*, 69 Fed. Reg. 1895 (Jan. 13, 2004). Alternatively, given that the Court of Appeals applied an erroneous standard, the Court may wish to consider reversing and remanding to the Court of Appeals for initial application of the proper standard.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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